

No. 19-15566

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SHAWNE ALSTON; et al.,
Plaintiffs-Appellees,

v.

**NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
The NCAA; et al.,**
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
CLAUDIA WILKEN, DISTRICT JUDGE • CASE NO. 4:14-MD-02541-CW

**AMICUS CURIAE BRIEF OF NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS IN SUPPORT OF NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION**

HORVITZ & LEVY LLP
BRADLEY S. PAULEY
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800

ATTORNEYS FOR AMICUS CURIAE
NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS

CORPORATE DISCLOSURE STATEMENT

The National Federation of State High School Associations is an Illinois not-for-profit corporation. It has no corporate parent, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF COMPLIANCE WITH RULE 29(a)(4)(E).....	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. Amateurism is the principle that the dedicated pursuit of excellence in sports for nonmonetary reasons is constructive to the well-rounded development of young people.	4
II. Amateurism among student athletes has intrinsic benefits, encourages widespread participation, and levels the playing field among competing schools.....	5
III. Amateurism is central to the athletic and educational mission of the NFHS.....	7
IV. Similar considerations favor the maintenance of a robust culture of amateurism at the collegiate level.....	10
V. Courts should be mindful of the negative unintended consequences of departing from the amateur ideal in college sports.....	11
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.</i> , 468 U.S. 85 (1984)	10
<i>O'Bannon v. Nat'l Collegiate Athletic Ass'n</i> , 802 F.3d 1049 (9th Cir. 2015)	5
Rules	
<i>Fed. R. App. P.</i> 29(a)(4)(e)	3
Miscellaneous	
<i>Amateur</i> , Merriam Webster's Collegiate Dictionary 38 (11th ed. 2007)	4
Be True to Your School Lyrics, Genius, https://bit.ly/2ZhWzaH (last visited Aug. 20, 2019)	8
<i>President Roosevelt's Address In Union on Saturday on Questions of Local and National Interest</i> , The Harvard Crimson (Feb. 25, 1907), https://www.thecrimson.com/article/1907/2/25/president-roosevelts-address-pttheodore-roosevelt-80/ (last visited Aug. 20, 2019)	10, 11
Nat'l Fed'n of State High Sch. Ass'ns, NFHS Handbook 2018-2019 (2018), https://bit.ly/2ZblNHC	7, 9
Nat'l Fed'n of State High Sch. Ass'ns, <i>The Case for High School Activities</i> , https://bit.ly/2dSKvJ2 (last visited Aug. 20, 2019)	6
Torin Koos, <i>The 23 most inspirational quotes from exceptional athletes</i> , Deseret News (Sept. 25, 2014, 11:54 AM), https://bit.ly/30rrcfl	6

12th man (football)Wikipedia, https://en.wikipedia.org/wiki/12th_man_(football)	7
<i>Student-Athletes</i> , NCAA, ncaa.org/student-athletes	11

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHAWNE ALSTON; et al.,
Plaintiffs-Appellees,

v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
The NCAA; et al.,
Defendants-Appellants.

**AMICUS CURIAE BRIEF OF NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS IN SUPPORT OF NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION**

INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations (“NFHS”) is the national service and administrative organization of high school athletics. Founded in 1920 and headquartered in Indianapolis, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. Approximately ninety percent of the high schools in the

United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students through their participation in interscholastic athletics and activities. It strives to promote participation and sportsmanship in athletics, to develop good citizens through such participation, and to enrich the educational experience of students. The NFHS also seeks to protect the role that interscholastic athletics plays in education and to develop solutions to problems related to high school athletics.

The NFHS, along with its state association members, believes that amateurism in athletics is not only valuable for its own sake, but also is a key aspect of a well-rounded education. The organization is concerned that the district court's opinion does not fully appreciate either the concept of amateurism or the many benefits it brings to college and high school sports in particular, and to American sports in general.

STATEMENT OF COMPLIANCE WITH RULE 29(a)(4)(E)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Amateurism is a longstanding, dominant feature of education-based sports in America, predicated on the idea that student athletes compete not for compensation, but rather to develop positive character traits such as leadership and good sportsmanship, and for the intrinsic love of the game. Students who play sports benefit from a strong tradition of amateurism, which promotes broad participation across multiple sports by athletes of varying skill levels. Amateurism also confers substantial benefits on student bodies and academic institutions. The survival of, and continued national support for, amateurism is elemental to high schools' mission of developing the character of individual student athletes while also offering broad opportunities for competition to the greatest number of students.

If amateurism were to give way to professionalism at the collegiate level, negative consequences likely would ensue. Of particular concern to the NFHS, the proliferation of professional sports at the college level could adversely impact amateurism in high school athletics and imperil its future. Without this emphasis on amateurism, high schools would struggle to fulfill their ultimate goal of preparing large numbers of well-rounded individuals for futures beyond athletics. The NFHS thus urges this Court to reaffirm the importance of amateurism as a guiding principle of athletics in American education.

ARGUMENT

I. **Amateurism is the principle that the dedicated pursuit of excellence in sports for nonmonetary reasons is constructive to the well-rounded development of young people.**

Merriam-Webster's dictionary defines "amateur" as "one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession." *Amateur*, Merriam Webster's Collegiate Dictionary 38 (11th ed. 2007). The principle of amateurism in sports is premised on the age-old belief that the dedicated pursuit of excellence can help athletes to develop a strong work ethic, learn fair play and good

sportsmanship, develop leadership skills, understand the importance of teamwork, achieve focus, cultivate time management skills, and generally become more well-rounded people.

Amateurism is about the ineffable benefits that an amateur athlete garners by pursuing athletic accomplishment for its own sake. And it may equally be defined by what it is not: the pursuit of a paycheck. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015) ("[N]ot paying student athletes is *precisely what makes them amateurs.*").

II. Amateurism among student athletes has intrinsic benefits, encourages widespread participation, and levels the playing field among competing schools.

Historically, amateurism has been viewed as integral to the tasks of moral and ethical education, the development of social harmony, and the physical development of student athletes. Education-based athletics are intended to develop hardworking and reliable young men and women of good character whose skill sets transfer well to the workplace. This aspirational goal is often attained. "Students who compete in high school activity programs have better educational outcomes, including higher grades, higher achievement test scores, and

higher educational expectations beyond high school.” Nat’l Fed’n of State High Sch. Ass’ns, *The Case for High School Activities*, <https://bit.ly/2dSKvJ2> (last visited Aug. 20, 2019).

But amateurism does more than support the personal development of individual student athletes, it sets a tangible, positive example for all students and for the community at large. As Knute Rockne, the early twentieth century amateur college football player and legendary college coach put it, “One man practicing sportsmanship is far better than 50 preaching it.” Torin Koos, *The 23 most inspirational quotes from exceptional athletes*, Deseret News (Sept. 25, 2014, 11:54 AM), <https://bit.ly/30rrcfi> (original formatting omitted).

Amateurism also supports strong and cohesive student bodies, and is thus good for school spirit. Amateurism in high school and college sports promotes an environment in which audience members are not mere passive spectators but enthusiastic and spirited supporters of their teams and fellow students. In education-based football, the engaged student crowd’s integral—and often decisive—role in the contest has long been recognized as the proverbial “twelfth man” (there being eleven players per side in an American football game). It is

noteworthy that the first recorded use of the term was in connection with amateur college football around 1900. *12th man (football)*, Wikipedia, [https://en.wikipedia.org/wiki/12th_man_\(football\)](https://en.wikipedia.org/wiki/12th_man_(football)) (quoting a September 1900 University of Minnesota magazine article referring to “the mysterious influence of the twelfth man on the team, the rooter”) (last visited August 20, 2019). Today, “[m]any high schools in the United States incorporate 12th Man language into their booster, supporter, or rooter clubs.” *Id.*

III. Amateurism is central to the athletic and educational mission of the NFHS.

The principle that student-athletes are students first and athletes second, and that athletics exist primarily to advance an institution’s educational mission, applies fully to high school athletics. The NFHS’s belief is that high school athletes should be enrolled students of their respective schools in order to “promote amateurism by drawing athletes only from each school’s student population,” Nat’l Fed’n of State High Sch. Ass’ns, NFHS Handbook 2018-2019 19 (2018), <https://bit.ly/2ZblNHC> [hereinafter NFHS Handbook 2018-2019]. This precept underscores the well-recognized link between amateurism and community identity, a link with lasting resonance in American culture.

Examples of this cultural resonance include the 2004 film, *Friday Night Lights*, about a high school football team in Texas whose town is obsessed with their success, and the 1986 film *Hoosiers*, about an underdog high school basketball team from a small town in Indiana. Another cultural marker is the Beach Boys' 1963 top-ten hit, "Be True to Your School," which includes the lines:

I got a letterman's sweater
With a letter in front
I got for football and track
I'm proud to wear it now
When I cruise around
The other parts of the town
I got a decal in back

So . . . [b]e true to your school now. . . .
Let your colors fly.

Be True to Your School Lyrics, Genius, <https://bit.ly/2ZhWzaH> (last visited Aug. 20, 2019).

This time-honored link between the athlete who pursues excellence for love of the game and to bring honor to his or her school,

and the community that supports that athlete and celebrates his or her victories in return, should not be lightly cast aside.

The NFHS's student enrollment guideline is intended to "avoid[] professionalism and over-emphasis on athletes." NFHS Handbook 2018-2019, *supra*, at 19. This, in turn, allows student athletes to act as "role models for other students." *Id.* Conversely, it seeks to prevent creeping professionalism (and the concomitant money and celebrity status it would confer on athletes) from driving an unnecessary wedge between student-athletes and the student bodies they represent. Meanwhile, an "amateur/awards limitation promotes amateurism, stimulates participation for the sake of the game itself . . . and encourages students to engage in athletic competition for physical, mental and social benefits." *Id.* at 21.

Amateurism at the high school level also allows for widespread participation, so that virtually any student who wishes to compete can play a sport and reap the associated benefits. In 2017-2018, some 7,980,866 student athletes participated in high school athletics nationwide.

IV. Similar considerations favor the maintenance of a robust culture of amateurism at the collegiate level.

The Supreme Court has observed that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports[,]” *National Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984), in much the same way that the NFHS and its members play that role at the high school level. The principle of broad amateur participation is as much a founding principle and perennial feature of college athletics as it is for high school sports. As President Theodore Roosevelt, who played a major role in the creation of the National Collegiate Athletic Association (“NCAA”), declared in a famous address, “Our chief interest should not lie in the great champions in sport. On the contrary, our concern should be most of all to widen the base, the foundation in athletic sports; to encourage in every way a healthy rivalry which shall give to the largest possible number of students the chance to take part in vigorous outdoor games.”

President Roosevelt’s Address In Union on Saturday on Questions of Local and National Interest, The Harvard Crimson (Feb. 25, 1907),

<https://www.thecrimson.com/article/1907/2/25/pres-roosevelts-address->

ptheodore-roosevelt-80/ (last visited Aug. 20, 2019) [hereinafter *President Roosevelt's Address*].

The NCAA's longstanding commitment to amateurism is beneficial because it makes thousands of aspiring high school students' dreams of competing at the collegiate level a reality. This is because, under the amateurism model, funds are more equitably distributed between collegiate nonrevenue sports and revenue sports, creating a large number of opportunities for student athletes in a broad variety of athletic endeavors. Indeed currently, “[m]ore than 460,000 NCAA student-athletes – more than ever before – compete in 24 sports every year.” *Student-Athletes*, NCAA, ncaa.org/student-athletes (last visited Aug. 20, 2019).

V. Courts should be mindful of the negative unintended consequences of departing from the amateur ideal in college sports.

If college athletes were compensated as professionals, it would erode their connections to their schools and likewise would undermine their fellow students' bonds with their sports teams. “It is of far more importance that a man shall play something himself, even if he plays it badly, than that he shall go with hundreds of companions to see

someone else play well, and *it is not healthy for either students or athletes if the teams are mutually exclusive.*" President Roosevelt's *Address, supra* (emphasis added). The same would undoubtedly be true at the high school level.

CONCLUSION

Amateurism is an integral part of American academic and sports culture. The NCAA should be afforded the freedom to define amateurism in a way that preserves the ideal of the student athlete in higher education while also meeting the present needs of its member schools and conferences. In so doing, the Court would protect important values of education-based sport at all levels.

August 23, 2019

HORVITZ & LEVY LLP
BRADLEY S. PAULEY

By: _____ s/Bradley S. Pauley _____

Attorneys for Amicus Curiae
NATIONAL FEDERATION OF
STATE HIGH SCHOOL
ASSOCIATIONS

CERTIFICATE OF COMPLIANCE

This brief contains 1,930 words (as counted by the word-processing program used to prepare the brief), which is less than the 7,000-word limit established by Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a). The format of this brief (including its type size and typeface) complies with the pertinent sections of Fed. R. App. P. 32(a).

August 23, 2019

s/Bradley S. Pauley